

Judge Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

NORMAN HUGH SMITH,

Defendant.

NO. CR00-0186Z

GOVERNMENT'S RESPONSE
IN OPPOSITION TO DEFENDANT'S
MOTION FOR RELEASE PENDING
APPEAL

The United States, by and through John McKay, United States Attorney, and Mark N. Bartlett, First Assistant United States Attorney for the Western District of Washington, hereby files this response in opposition to defendant Norman Hugh Smith's motion for release pending appeal. Because the defendant failed to meet the standards set forth in 18 U.S.C. § 3143(b), this motion should be denied.

I. STATUS OF THE CASE

On April 18, 2001, this Court sentenced Smith to 36 months' imprisonment and one year supervised release following his guilty pleas to two counts of Making and Subscribing to a False Individual Tax Return and two counts of Making and Subscribing to a False Corporate Tax Return.

On October 26, 2004, United States Probation Officer Calvin Bouma alleged that Smith had committed six violations of the conditions of his supervised release. An

1 evidentiary hearing was held before Magistrate Judge Mary Alice Theiler on June 14,
 2 July 14, August 25 and August 29, 2005, concerning the violations. At the conclusion
 3 of the hearing, Magistrate Judge Theiler recommended that the District Court find that
 4 Smith committed five violations of his conditions of supervised release.

5 On November 4, 2005, this Court accepted the recommendation of Magistrate
 6 Judge Theiler and found that Smith had committed five violations of the terms of his
 7 supervised release. The Court sentenced Smith to a nine month period of incarceration,
 8 and imposed no further term of supervised release.

9 Following sentencing, the defendant filed a notice of appeal, and on November
 10 23, 2005, Smith filed a motion for release pending appeal.

11 II. ARGUMENT

12 Defendant moves this Court for release pending appeal pursuant to 18 U.S.C.
 13 § 3143(b), which provides, in pertinent part, that:

14 [T]he judicial officer shall order that a person who has been
 15 found guilty of an offense and sentenced to a term of
 16 imprisonment, and who has filed an appeal . . . be detained,
 unless the judicial officer finds—

17 (A) by clear and convincing evidence that the person is not
 likely to flee . . . ; and

18 (B) that the appeal is not for the purpose of delay and raises a
 19 substantial question of law or fact likely to result in—

20 * * *

21 (iv) a reduced sentence to a term of
 22 imprisonment less than the total of the time
 already served plus the expected duration of
 the appeal process.

23 Defendant bears the burden of proof under 18 U.S.C. § 3143(b). United States v.
Montoya, 908 F.2d 450, 451 (9th Cir. 1990); United States v. Wheeler, 795 F.2d 839,
 24 840 (9th Cir. 1986). To demonstrate entitlement to release, a defendant must show:
 25 (1) by clear and convincing evidence that he or she is not likely to flee; (2) that the
 26 appeal is not for the purpose of delay; (3) that the appeal raises a substantial question of
 27 law or fact; and (4) that if the substantial question is determined favorably to the
 28

1 defendant it will likely result in a reversal, a new trial, a sentence other than a term of
 2 imprisonment, or a sentence less than the time to be served during the expected appeal
 3 process on all counts on which imprisonment has been imposed. Id.; United States v.
 4 Mett, 41 F.3d 1281, 1282, n.3 (9th Cir. 1995). Mr. Smith cannot prevail unless all the
 5 standards are met.

6 An appeal raises a substantial issue of law or fact if the issue is one that is fairly
 7 debatable, or doubtful, or one of more substance than would be necessary for a finding
 8 that the issue is not frivolous. United States v. Montoya, supra; United States v. Handy,
 9 761 F.2d 1279, 1283 (9th Cir. 1985). The defendants bear the burden of proof to
 10 establish that the issues are “fairly debatable.” Montoya, supra, at 450. General
 11 descriptions of possible issues on appeal are insufficient to meet the burden of proof. Id.

12 Defendant Smith has not met his burden of proof. Smith has failed to raise a
 13 substantial question of law or fact regarding the sentence imposed upon him by this
 14 Court.

15 **A. Defendant Smith Has Failed to Raise a Substantial Question of Law or Fact**

16 The appeal in this case does not raise a substantial issue of law or fact.
 17 Smith indicates that he has one issue to raise on appeal: whether Smith was required to
 18 report assets such as the F/V Alliance or the Off-Shore Adventures account.

19 This argument is without merit. The Ninth Circuit has defined the term
 20 “substantial question” as one that is “fairly debatable” or “fairly doubtful,” and “one of
 21 more substance than would be necessary to a finding that it was not frivolous.” United
 22 States v. Handy, 761 F.2d at 1283. Although Smith may have described a single
 23 general issue that could conceivably be raised on appeal, this does not rise to the level of
 24 a substantial question of law or fact under 18 U.S.C. § 3143(b), and should therefore be
 25 denied. Montoya, 908 F.2d at 451.

III. CONCLUSION

For the reasons stated above, the United States requests that the Court deny defendant's motion for release pending appeal.

DATED this 28th day of November, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 28, 2005, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

s/FAY FRENCH
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